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BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

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IN THE MATTER OF THE APPLICATION
OF ARIZONA PUBLIC SERVICE
COMPANY, IN CONFORMANCE WITH THE
REQUIREMENTS OF ARIZONA REVISED
STATUTES §§ 40-360, *et seq.*, FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AUTHORIZING THE TS-5
TO TS-9 500/230kV TRANSMISSION LINE
PROJECT, WHICH ORIGINATES AT THE
FUTURE TS-5 SUBSTATION, LOCATED IN
THE WEST HALF OF SECTION 29,
TOWNSHIP 4 NORTH, RANGE 4 WEST
AND TERMINATES AT THE FUTURE TS-9
SUBSTATION, LOCATED IN SECTION 33,
TOWNSHIP 6 NORTH, RANGE 1 EAST, IN
MARICOPA COUNTY, ARIZONA

Docket No. L-00000D-08-0330-00138

Case No. 138

**LEGAL MEMORANDUM
REGARDING THE SUBSTANTIAL
CHANGE STANDARD AND
RELATED ISSUES**

As requested by Chairman Foreman, Applicant, Arizona Public Service Company, submits this legal memorandum addressing issues raised by the proposals of various intervenors to include corridors in a certificate of environmental compatibility ("CEC") in this case that were not included in the public notice of hearings or in the Applicant's CEC application.¹

Background:

The Applicant filed a CEC application for its TS-5 to TS-9 transmission line project (the "Project") on July 1, 2008. During the hearings on this application conducted by the Committee, intervenors proposed several additional corridors that were not included in the CEC application or in the public notice of the Committee's hearings. The three proposed corridors that are under consideration by the Committee: (1) a 500-foot widening of the Alternative 3 corridor for approximately two miles, (2) a new corridor on the west side of the Hassayampa River, and (3) a

¹ This brief analyzes only the public notice requirements under the Committee's governing regulations. The Committee is also subject to Open Meeting Laws. A.R.S. §§ 38-431 to -431.09. Publication of the agenda provided by the Chairman on November 21, 2008 addresses the Open Meeting Laws' pre-requisites for the proposed 500-foot corridor expansion and authorizes the Committee to consider this alternative under the Open Meeting Laws.

1 corridor running along the existing "Westwing" power lines. Additionally, questions have been
2 raised concerning the timeframe within which the Committee must act on the CEC application.

3 **Questions:**

- 4 I. Does the Committee have authority to issue a CEC approving these proposed corridors that
5 were not included in the public notice of the hearings?
6 II. May the Committee postpone voting on the CEC application beyond the 180-day statutory
7 timeframe?

8 **Brief Answers:**

- 9 I. The Committee has authority to issue a CEC approving the first proposed corridor (500-foot
10 expansion along Alternative 3) because it is not a substantial change from the corridor
11 described in the Project's public notice. The other two proposed corridors are substantial
12 changes from the noticed corridors and, therefore, beyond the Committee's authority to
13 approve without further public notice and hearings.
14 II. Unless the Applicant consents to an extension of the 180-day period prescribed by A.R.S.
15 360.04(D), the Committee may not postpone its decision beyond December 29, 2008.

16 **Discussion:**

- 17 **I. The Committee has authority to approve a corridor that was not included in a project's**
18 **public notice if it is not a "substantial change" from the corridors described in the public**
19 **notice.**

20 The Committee's chairman is required to provide public notice of hearings on a CEC
21 application by publication in a local newspaper. A.R.S. § 40-360.04(A)², A.A.C. R14-3-208(C)³.
22 The published notice must include "a general description of the substance and purpose of such
23 hearing." A.A.C. R14-3-208(C). After conducting hearings on a CEC application, if the
24 Committee "proposes to condition the certificate on the use of a site other than the site or sites
25 generally described in the notice and considered at the hearing, a further hearing shall be held
26 thereon after public notice." A.R.S. § 40-360.04(A). Similarly, if an applicant amends its

24 ² "The chairman of the committee shall, within ten days after receiving an application, provide public
25 notice as to the time and place of a hearing on the application and provide notice by certified mail to the
26 affected areas of jurisdiction at least twenty days prior to a scheduled hearing."

³ "Public notice", as used herein, shall mean two publications in a daily or weekly newspaper of general
circulation within the general area in which the proposed ... transmission line is proposed to be located."

1 application after public notice has been given and the Committee's chairman determines that the
2 amendment "constitutes a substantial deviation from the public notice," the Committee must hold
3 additional hearings after another public notice. A.A.C. R14-3-207(B). In the analogous situation
4 of where a project's design is modified after a CEC is granted, the Commission has adopted the
5 "substantial change" standard to determine whether an additional public notice and hearings are
6 necessary.

7 The key Commission case on substantial change is Commission Decision No. 58793
8 (1994) known as the Whispering Ranch Decision. In that case, SRP was granted a CEC to build a
9 DC transmission line but subsequently changed the project to build an AC line. The Commission
10 decided that building an AC line rather than a DC line was a "substantial change" because of the
11 amount of public concern over the potential biological and health effects of the EMF from an AC
12 line. The Commission did not articulate a "bright line" definition of substantial change. Instead,
13 it ruled that it is the responsibility of the Commission or Committee to decide whether a change is
14 substantial or not based on the facts of each particular case and using the criteria set forth in the
15 Administrative Procedures Act (A.R.S. § 41-1025).

16 A.R.S. § 41-1025 addresses whether a revised proposed rule is substantially different from
17 the published proposed rule using three factors:

- 18 1. The extent to which all persons affected by the rule should have understood
19 that the published proposed rule would affect their interests.
- 20 2. The extent to which the subject matter of the rule or the issues determined by
21 that rule are different from the subject matter or issues involved in the
22 published proposed rule.
- 23 3. The extent to which the effects of the rule differ from the effects of the
24 published proposed rule if it had been made instead.

25 A.R.S. § 41-1025(B). Using these three factors, as modified to apply to a CEC application rather
26 than a proposed rulemaking, the Commission determines whether a revision to a CEC application
is a substantial change. If a proposed corridor is not a substantial change from the corridors
described in the public notice, then the Commission has the authority to approve a CEC that

1 includes that corridor. If the Commission determines that a proposed corridor is a substantial
2 change from the noticed corridors, then additional public notice and hearings would be required
3 before the Commission may include the corridor in a CEC.

4 **A. 500-foot expansion of Alternative 3 corridor on south side of SR 74 for**
5 **approximately two miles is not a substantial change from the noticed corridor for**
6 **Alternative 3.**

7 The proposed southward expansion of the Alternative 3 corridor by 500 feet from milepost
8 8.3 to milepost 10.3 along SR 74 is not a substantial change from the corridor described in the
9 public notice of the hearings for the Project. First, the only party that would be directly affected
10 by the proposed corridor is the State Land Department ("SLD"), which owns the 500-foot strip of
11 land within the proposed corridor expansion. SLD understood that the Alternative 3 corridor as
12 noticed would affect its interests and has participated fully in the hearings. The only entity that
13 could be indirectly affected by the expanded corridor is the Bureau of Land Management
14 ("BLM") which owns land adjacent to the proposed corridor expansion. However, any impact on
15 BLM from the proposed expansion would be relatively insignificant compared to the noticed
16 corridor's impact on BLM throughout this route segment. More importantly, BLM had notice that
17 its interests could be affected by this Project and is aware of the Committee's proceedings.

18 Second, the "subject matter" of the modified corridor is identical to that of the noticed
19 corridor – the eventual acquisition of a 200-foot (maximum) right-of-way and construction of a
20 500/230kV transmission line along SR 74.

21 Third, the effects of the expanded corridor would be essentially identical to the effects of
22 the noticed corridor but with a slightly increased area of potential impact. The noticed corridor in
23 this area is 3,500-feet wide (1,500 feet on the south side of SR 74) and the modified corridor
24 would only increase that width by 500 feet for approximately 2.1 miles of the 11.6 mile route
25 segment. There is no identifiable difference in environmental effects between constructing the
26 transmission line within this 500-foot strip and constructing it within the noticed corridor. None

1 of the factors from A.R.S. § 41-1025(B) indicate that this modified corridor should be considered
2 a substantial change from the corridor described in the Project's public notice.⁴

3 **B. A corridor on the west side of the Hassayampa River is a substantial change from**
4 **the noticed corridors.**

5 In contrast to a limited, 500-foot expansion of a previously noticed corridor, all three
6 factors from A.R.S. § 41-1025(B) indicate that a new corridor on the west side of the Hassayampa
7 River is a substantial change from the noticed corridors. First, the people that would be affected
8 by the proposed corridor – landowners west of the river – had no reason to believe that they would
9 be affected by the Project based on the published notice. The notice did not include any corridors
10 west of the Hassayampa River and did not mention the possibility of any portion of the line being
11 sited west of the river. No reasonable person would have anticipated the Committee approving a
12 route on the west side of the river as a result of the noticed hearings. This factor alone supports
13 the conclusion that this proposed corridor would be a substantial change from the corridors
14 described in the public notice for the Project.

15 Second, although a corridor west of the river would serve the same basic purpose as the
16 noticed corridors, its “subject matter” would be different because it involves an entirely new
17 corridor as opposed to the mere expansion of a noticed corridor. In addition, one important
18 purpose of the noticed corridors was to locate the transmission line in a way that will facilitate
19 serving future growth in the adjacent areas. The proposed corridor does not satisfy this purpose as
20 well as the noticed route. The proposed corridor also has an important purpose that the noticed
21 corridors do not – to minimize the Project's potential impacts on one particular landowner.

22 Third, the effects of the proposed corridor will certainly be different from those of the
23 noticed corridor. One known effect of the proposed corridor is that more land and property
24 owners will be affected because any route west of the river will be at least four miles longer than

25 ⁴ As stated at the hearing on this application on November 19, 2008, the Applicant will not object to this
26 corridor extension if (1) the Committee makes an explicit finding that the extension is not a substantial
change and (2) no intervenor involved in this proceeding objects to the expanded corridor.

1 the noticed route.⁵ One adverse environmental effect of the proposed route that is different from
2 the noticed routes is that it would require crossing the Hassayampa River in two locations.⁶

3
4 **C. A corridor running along the existing “Westwing” power lines is a substantial
change from the corridors described in the Project’s public notice.**

5 The analysis of the proposed Westwing corridor is similar to the preceding analysis of a
6 corridor west of the Hassayampa River. First, landowners that would be affected by the corridor
7 did not know, and had no reason to believe, that the Project would affect them. This route was not
8 the Applicant’s preferred route and was not within any portion of the published alternative routes.
9 Second, as with the prior proposal, the purpose and “subject matter” of this corridor are different
10 from that of the noticed corridors because it is in a completely different location and one of its
11 primary purposes is to avoid potential impacts on one particular property owner. Finally, the
12 effects of this corridor will undoubtedly be very different from the effects of the corridors
13 described in the public notice because it is in an entirely new location – different properties will
14 be impacted and the environmental effects will differ accordingly.

15 **II. The Committee must either issue or deny the Project’s CEC by December 29, 2008⁷,
16 unless the Applicant consents to a tolling of the 180-day period.**

17 The Committee must make a decision on a CEC application within 180 days of receiving
18 the application⁸ and may not postpone this deadline without the applicant’s consent. The statute
19 imposing this 180-day deadline does not include any exceptions and no other statute of which the
20

21 ⁵ Letter from Mike DeWitt, Project Manager, Arizona Public Service Company, to Walter Bouchard,
22 President, Walter L. Bouchard & Associates, Inc. (November 14, 2007) (Application Exhibit B-2, Tab:
Developer Correspondence, Section: 10,000 West LLC/Lyle Anderson Company).

23 ⁶ *Id.*

24 ⁷ December 27, 2008 is 180 days from July 1, 2008 – the date that the application was filed with the
Committee. Since this is a Saturday, the 180-day period for the Committee’s decision extends to and
includes Monday, December 29, 2008. A.A.C. R14-3-215.

25 ⁸ A.R.S. § 40-360.04(D) (“The committee shall review and consider the transcript of the public hearing or
26 hearings and shall by a decision of a majority of the members issue or deny a certificate of environmental
compatibility within one hundred eighty days after the application has been filed with or referred to the
committee.”).

1 Applicant is aware gives the Committee authority to continue or extend proceedings beyond this
2 period without the applicant's acquiescence. A.A.C. R14-3-209 give the Committee authority to
3 grant continuances and extensions generally, but there is no basis for interpreting this rule as
4 giving the Committee authority to extend the 180-day statutory period.

5 For good cause shown, continuances and extensions of time will be granted in the
6 discretion of the Presiding Officer⁹, provided however, that when such continuance
7 or extension is provided to an applicant, the running of the 180-day period ... shall
be deemed to be tolled and shall cease to run during such continuance or extension.

8 A.A.C. R14-3-209. The best interpretation of this rule is that the Committee may grant
9 continuances and extensions of time with respect to the numerous deadlines that it imposes during
10 a typical siting proceeding. This rule does not give the Committee authority to extend the 180-day
11 statutory period for issuing a decision or any other statutorily imposed deadline.

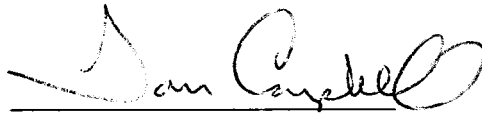
12 The previously quoted rule provides that the applicant must agree to a tolling of the 180-
13 day period if it receives a continuance or extension of time from the Committee. It in no way
14 gives intervenors a way to toll the deadline by requesting continuances or extensions of time.
15 Allowing a tolling of the 180-day period only when an *applicant* is granted an extension is
16 consistent with the purpose of the deadline, which is to ensure that CEC applicants are able to
17 obtain timely consideration of their applications.¹⁰

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23 ⁹ "Presiding Officer" means "a Commissioner or Hearing Officer conducting a hearing". AAC R14-3-
102(G).

24 ¹⁰ See A.R.S. § 40-360.08(B) ("If the committee or the commission fails to act on an application within the
25 applicable time period prescribed in this article, the applicant may, in its discretion and in the interest of
26 providing adequate, reliable and economical electric service to its customers, immediately proceed with
the construction of the planned facilities at the proposed site or, if application has been made for
alternative sites, at the proposed site which in the opinion of the applicant best satisfies the factors
expressed in section 40-360.06.").

1 RESPECTFULLY submitted this 26th day of November, 2008.

2
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4 

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14 **COPY** of the foregoing
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